Supreme Court, U. S.
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No. 79-1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants

VS.

FEDERAL ELECTION COMMISSION, et al.,
Appellees

On Appeal from the United States Court of Appeals for the Ninth Circuit En Banc

BRIEF OPPOSING MOTION TO DISMISS THE APPEAL OR IN THE ALTERNATIVE TO AFFIRM

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ARGUMENT

I

Jurisdiction to hear this appeal exists by virtue of 2 U.S.C. § 437h(b), regardless of whether the Court of Appeals sat en banc pursuant to Rule 35 when passing on questions certified pursuant to § 437h(a)

The Federal Election Commission ("the Commission") argues this Court lacks jurisdiction to hear the appeal because the court of appeals sat *en banc* pursuant to Rule 35 of the Federal Rules of Appellate Procedure, rather than pursuant to § 437h(a).[1] Motion of the Federal Election Commission to Dismiss or in the Alternative to Affirm at 6-7 ("Motion ....."). This argument confuses this Court's appellate jurisdiction under § 437h(b) with the jurisdiction of the court of appeals to render a decision on the certified questions under § 437h(a) and the concurrent mandate of § 437h(a) that the court of appeals sit *en banc*.

Jurisdiction to hear this appeal is based on § 437h(b), which provides in pertinent part:

> . . . any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States . . .

Once the court of appeals has decided "a matter certified under subsection (a)" the right of appeal to this Court lies. Nothing in § 437h(b) requires the court of appeals to sit *en banc* pursuant to § 437h(a) as a prerequisite for this

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[1]All citations are to the Federal Election Campaign Act of 1971, P.L. 92-225, 2 U.S.C. § 431 *et seq.*, as amended, unless otherwise noted. Pertinent provisions are reproduced in Appendix B to the Jurisdictional Statement and Appendix A to the Commission's Motion.

Court's jurisdiction. Instead, jurisdiction is premised on certification by the district court to the court of appeals pursuant to § 437h(a), and a decision by the court of appeals on the certified questions.

The Commission's reliance on § 437h(a) is misplaced. The last sentence of § 437h(a) directs the district court to certify constitutional questions to the appropriate court of appeals, and directs the court of appeals to hear the certified questions sitting *en banc*. Clearly, this provision has two separate mandates: that the court of appeals hear the certified questions, and that it sit *en banc* to do so.

Instead of ruling on the validity of the *en banc* requirement, the court avoided the issue by exercising its discretion under Rule 35 to hear the matter *en banc*.[2] This was simply the exercise of judicial prudence. Rather than address what might be "delicate questions," the court skirted the constitutional issue, noting that the importance of the case warranted an *en banc* hearing pursuant to Rule 35. *CCH* at 50,997, J.S. App. at A-26. Invocation of Rule 35 in no way intrudes on this Court's jurisdiction pursuant to § 437h(b). Jurisdiction here does not depend on how the court of appeals sat when passing on the certified questions, but only on the fact that a decision was entered on a matter properly certified pursuant to § 437h(a). It is self-evident that the court of appeals rendered a decision on a matter certified pursuant to § 437h(a). An appeal therefore lies

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[2]The court of appeals requested the parties to address the constitutionality of the requirement that it sit *en banc*. Order by Chief Judge Browning filed August 1, 1979, Appendix E. Obviously the court had reservations about the practicality or validity of the requirement it hear such cases *en banc*. *California Medical Association, et al. v. Federal Election Commission, et al.*, ... F.2d .... (9th Cir. 1980), *Federal Election Campaign Financing Guide* (*CCH*), ¶ 9127 at 50,996-50,997, Jurisdictional Statement, Appendix A at 24-27 ("J. S. App. ....").

pursuant to § 437h(b). The Commission's arguments regarding Rule 35 are irrelevant and erroneous. This Court has jurisdiction.

II

Enforcement proceedings under § 437g do not bar proceedings brought under § 437h

The Commission argues that when enforcement proceedings pursuant to § 437g are underway those proceedings provide the exclusive forum to raise constitutional challenges to the Act. Motion at 8-12. In essence the Commission argues that by instituting enforcement proceedings pursuant to § 437g it cuts off the rights of the respondent to invoke the expedited judicial review provisions of § 437h. Nothing in the statute suggests, much less mandates, this conclusion. Indeed, the statute is silent on the interrelationship between §§ 437g and 437h. On their face, these provisions appear to be exclusive of one another. Nor do the cases cited by the Commission support the conclusions urged.

The enforcement mechanism established by § 437g requires that the Commission proceed in stages. Initially, the Commission may act upon receipt of a sworn complaint and notification to the person who has allegedly violated the Act. § 437g(a)(1). The Commission may also act on the basis of information it has ascertained in the normal course of its activities. § 437g(a)(2). A respondent is entitled to notice from the general counsel on a recommendation by the general counsel to "proceed to a vote on probable cause". The respondent may file a brief in response. § 437g (a)(3). If the Commission determines there is probable cause to believe a violation exists it must attempt for a period of at least 30 days to correct or prevent the alleged violation by informal methods of conference, conciliation and persuasion. § 437g(a)(4)(A)(i). If the Commission has probable cause to believe that a knowing and willful viola-

tion of the Act has occurred, it may refer the apparent violation to the Attorney General. § 437g(a)(5)(C). If a conciliation agreement is violated, the Commission may institute a civil action. § 437g(a)(5)(D). If conciliation efforts are unsuccessful, the Commission may institute a civil action. § 437g(a)(6). Judgment entered by a district court pursuant to § 437g may be appealed to the court of appeals, but is only reviewable by the Supreme Court by certiorari or certification. § 437g(a)(9).

By comparison to the expedited judicial review provisions of § 437h, the administration process set forth in § 437g involving, *inter alia*, notification, investigation, reply by the respondent, informal conference and conciliation, litigation in the district court, appeal to the court of appeals, and a petition for certiorari are potentially more time-consuming, cumbersome and uncertain. The impact of the Commission's argument is that once this process is underway the only recourse a respondent has is to wait until suit is filed to raise constitutional issues. In contrast, § 437h fulfills the Congressional mandate of prompt judicial relief where constitutional questions are involved by creating a mechanism for expedited judicial review. There is simply nothing in the language of the statute to justify the Commission's conclusion that once proceedings are under way pursuant to § 437g the respondent is deprived of the way to invoke § 437h and receive a prompt determination of constitutional questions. This is so even despite § 437g(a)(10), which causes enforcement actions to be advanced on the docket. This section specifically provides that enforcement proceedings shall be advanced ahead of all other actions, except actions brought under § 437h.

The contrast between § 437g and § 437h was outlined in *Bread Political Action Committee v. Federal Election Commission*, 591 F.2d 29 (7th Cir. 1979). In deciding that certain persons not specifically named in § 437h(a) had standing to

invoke the expedited judicial review provisions, the court identified three Congressional purposes for § 437h, stating:

> . . . the language used and the nature of the review mechanism provided in § 437h show a Congressional intent to allow speedy judicial review of all possible constitutional challenges to any provision of the Act and to make certain that such challenges would be decided by the Supreme Court. Thus, three Congressional purposes are clear: comprehensive review, speedy review, and ultimate review by our highest court of constitutional challenge to the Act.

591 F.2d at 33. In reaching this conclusion the court underscored the distinction between the review mechanism, noting that § 437g(a)(10) (then denoted § 437g(a)(11)) ". . . makes it clear that Congress intended § 437h actions to take place precedence even over enforcement proceedings." 591 F.2d at 33.

The purpose of the expedited judicial review provisions of § 437h is not to defeat the purposes of an enforcement proceeding (Motion at 9) or to nullify the orderly enforcement process (Motion at 11) but merely to allow for the prompt resolution of valid constitutional questions. *Bread Political Action Committee v. Federal Election Commission,* 591 F.2d at 33. The present matter illustrates the concurrent operation of §§ 437g and 437h. The enforcement action, filed by the Commission after CMA filed the present action, was tried in March, 1980. *Federal Election Commission v. California Medical Association,* et al., No. C-79-1197-WHO (N.D. Cal., filed May 22, 1980). The parties are awaiting a decision by the district court. In that proceeding the district court denied a motion by CMA to stay the proceedings pending final resolution of the present matter. Thus, the enforcement action has proceeded without interference occasioned by separate proceedings under § 437h.

The Commission's analysis also ignores the distinction in the final relief available to a respondent in an enforcement action brought pursuant to § 437g and the plaintiff in an action brought under § 437h. In an enforcement proceeding the respondent may appeal to the court of appeals, but § 437g(a)(9) provides that the decision of the court of appeals may be reviewed by the Supreme Court only on a writ of certiorari or by certification. In contrast, § 437h (b) provides the option of an appeal to the Supreme Court.

The Commission cites several cases for the proposition that the enforcement proceeding provides the exclusive mechanism to raise a constitutional question. The cases are all distinguishable. *Clark v. Valeo,* 559 F.2d 642 (D.C. Cir. 1977) (en banc) (per curiam), *aff'd sub nom. Clark v. Kimmitt,* 431 U.S. 950 (1977), turned on the lack of ripeness and failure to present a justiciable issue. *Mott v. Federal Election Commission,* No. 79-3375 (D.D.C. June 30, 1980) *appeal docketed* No. 80-1949 (D.C. Cir. August 12, 1980) (Motion, Appendix B) turned on the lack of ripeness and the absence of a fully developed factual record. In *Gifford v. Congress,* 452 F.Supp. 809 (E.D. Cal. 1978) the court found that the constitutional challenges were frivolous. *Martin Tractor Co. v. Federal Election Commission,* 460 F.Supp. 1017 (D.D.C. 1978) *aff'd on non-§ 437h grounds,* No. 79-1027 (D.C. Cir. May 8, 1980) involved the explicit statutory grant of standing contained in § 437h(a) and the absence of ripeness. Unlike *Martin Tractor,* there is no allegation or inference in the present case of an absence of a justiciable controversy. Clearly the requirements of Article III of the Constitution have been satisfied, given the institution of enforcement proceedings against CMA and CALPAC.

Nowhere does the Commission distinguish the reasoning of *Bread Political Action Committee v. Federal Election Commission,* 591 F.2d 29 (7th Cir. 1979). There the court construed § 437h(a) as providing standing not only to those

parties explicitly mentioned in the statute, but to any party able to state a claim which meets the requirements of Article III. The court properly gave § 437h a broad interpretation to satisfy the Congressional intent that constitutional questions be handled expeditiously, and be given comprehensive review, with the litigants ultimately having the opportunity to appeal to the Supreme Court.

In arguing that the enforcement procedures set forth in § 437g would be disrupted by actions under § 437h, the Commission also ignores the decision in *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980). There the district court *sua sponte* certified constitutional questions for immediate review by the court of appeals. The second circuit held the certification procedures were applicable even though the issues had been raised by a counterclaim in an enforcement proceeding brought pursuant to § 437g, rather than a separate action under § 437h. The Commission's reference in a footnote to the CLITRIM opinion (Motion at 11, n. 6) fails to state that it was the Commission itself which took the position that the expedited judicial review provisions of § 437h applied even though the constitutional questions had been raised by a counterclaim rather than in a separate action. 616 F.2d at 49. It is disingenuous for the Commission to now argue that an enforcement proceeding under § 437g bars appellants from proceeding under § 437h.

The Commission also argues that § 437h is contrary to notions of judicial economy and the well-established principle that courts should avoid premature adjudication of constitutional questions. Motion at 11-12. Cases cited by the Commission demonstrate that courts are unlikely to be forced to prematurely adjudicate constitutional questions merely because the matter is presented pursuant to § 437h. *E.g., Federal Election Commission v. Central Long Island*

Tax Reform Immediately Committee, 616 F.2d at 51-53 (challenged provisions did not apply, no reason to consider constitutionality of the Act); *Clark v. Valeo,* 559 F.2d at 646, n.2 (district court discretion to dismiss for want of jurisdiction); *Gifford v. Congress,* 452 F.Supp. 802 (constitutional questions frivolous); *Martin Tractor Co. v. Federal Election Commission,* 460 F.Supp. at 1019-1020 (ripeness, lack of justiciable controversy).

The Commission's real argument appears that Congress made an unwise choice in permitting expedited judicial review of constitutional questions, by requiring the courts of appeals to sit *en banc,* and by granting obligatory appellate jurisdiction in the Supreme Court. The cases arising under § 437h, and in particular *Clark v. Valeo, supra,* demonstrate that the lower federal courts are not unhindered by § 437h in applying well-established constitutional doctrine to screen cases which do not present a substantial constitutional question. If a justiciable question exists, as in the present action, then it is appropriate for this Court to hear the appeal pursuant to § 437h. Significantly, the Commission does not argue the present action does not present a justiciable controversy. Policy arguments are insufficient to defeat jurisdiction here. This appeal clearly lies pursuant to § 437h.

III

The certified questions were not properly decided and argument is appropriate to permit a full presentation of the issues

This action was instituted for the limited purpose of challenging the $5,000 calendar year limit on "administrative support" which CMA may furnish to CALPAC. Administrative support is defined in § 441b(b)(2)(C) as something of value for the purpose of establishing, administering or soliciting contributions to a political committee. By

providing this support, CMA sustains CALPAC's operations without funding CALPAC's contributions to candidates. All of the certified questions are framed in terms of administrative support. J.S. App. C at A-86-A-87; *see*, J.S. at 8-10.

This action was not instituted to allow CMA to furnish unlimited cash contributions to CALPAC, which could then ultimately be used for making contributions to candidates. Motion at 14; *see,* majority opinion, *CCH* at 50,989, J.S. App. at A-5. By emphasizing the alleged abuses which would result if § 441a(a)(1)(C) was invalidated in its entirety, the Commission obscures the narrow question of whether limits on administrative support by an unincorporated association for its political action committee are valid.[3] The issues presented by this appeal involve in the first instance the narrow question of whether limits on CMA's administrative support of CALPAC can constitutionally be limited, particularly when corporations and labor organizations may provide unlimited administrative support to their political committees. It is appropriate for this Court to focus on this narrow issue, rather than problems which would allegedly result from total invalidation of the $5,000 limit. Judge Choy's concurring and dissenting opinion addresses these concerns by concluding that § 441a (a)(1)(C) should be invalidated only to the extent that it applies to unincorporated associations. *CCH* at 50,997, J.S. App. at A-28-A-30.

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[3]The notion that the comprehensive regulatory scheme enacted by the Act would be upset if CMA could provide unlimited cash to CALPAC for use in making contributions to candidates ignores the existence of limits on the contributor-candidate nexus enacted by § 441a(a)(1) and (2) and the limits on combined direct contributory activity by CMA and CALPAC inherent in the "nonproliferation rule" contained in § 441a(a)(5). See dissent, *CCH* at 51,011, J.S. App. at A-69-A-70.

The majority's failure to apply a strict standard of review when addressing the validity of § 441a(a)(1)(C) as applied too CMA's support of CALPAC is an error which deserves full briefing and argument. Majority opinion, *CCH* at 50,900, n. 4, 50,993, J.S. App. at A-7, n. 4, A-15. Contrary to the majority's conclusion, this case directly involves the exercise of first amendment rights. See, Judge Wallace's concurring and dissenting opinion ("dissent"), *CCH* at 51,010, J.S. App. at A-65. The proper approach, in light of the association freedoms infringed by the application of the $5,000 limit to CMA's support of CALPAC, is the strict standard of review. Dissent, *CCH* at 51,005; J.S. App. at A-53. Even if the rational basis test is applied, no sufficient basis exists to regulate CMA's administrative support of CALPAC, since this does not infringe on the contributor-candidate nexus which is separately regulated. Dissent, *CCH* at 51,011; J.S. App. at A-68-A-70.

CONCLUSION

Probable jurisdiction should be noted. In the alternative, this appeal should be set for argument with the question of jurisdiction postponed until argument on the merits.

Respectfully submitted,

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(Appendix E Follows)

Appendix E

United States Court of Appeals

For the Ninth Circuit

No. 79-4426

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,
Defendants-Appellees.

ORDER

[Filed August 1, 1979]

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING, Circuit Judge.

The court will hear oral argument in this case on Thursday, October 11, 1979 at 2:30 p.m., in San Francisco, California.

In addition to the questions certified by the United States District Court for the Northern District of California, in its order of July 9, 1979, the parties are requested to address the constitutionality of the portion of 2 U.S.C. § 437h(a) which requires the United States Court of Appeals to hear this matter sitting en banc.

Appellant will make suitable arrangements for furnishing this court with sixteen (16) copies of the trial court record.

The certificate of record is ordered filed as of August 1, 1979.

Appellant's opening brief is to be filed by August 22, 1979.

Appellee's brief is to be filed by September 12, 1979.

Appellant's reply brief, if any, is to be filed by September 19, 1979.

/s/ James R. Browning
United States Circuit Judge
Chief Judge